IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO (Ord) No.487 of 2000.

Reserved on: 10.12.2007.

Decided on: *December 11, 2007*

Badri Dass. ***.....Appellant.***

VERSUS

M/s.Gainda Mal Babu Mal & Co. and anr. ***.....Respondents.***

Coram

The Hon'ble Mr.Justice Kuldip Singh, Judge.

Whether approved for reporting?[1] No

For the Appellant: **Pt.Om Parkash, Advocate.**

For Respondents: **Mr.K.D.Sood, Advocate.**

Kuldip Singh, Judge

The plaintiff is in appeal against the order dated 31.7.2000 passed by Additional District Judge (II), Kangra at Dharamshala in Misc. Application in CS No.11/95 whereby application of defendant No.1 under Section 34 of the Arbitration Act, 1940 (for short 'the Act') has been allowed and the parties are directed to refer the case to the Arbitrator, mentioned in the agreement.

2. The facts, in brief, are that Badri Dass appellant / plaintiff filed a suit for recovery of Rs.3 lacs against respondents / defendants with interest at the rate of 18% per annum with effect from 29.4.1993 for supplying *Katha* to defendant No.1 on various dates. The respondent / defendant No.1 is a firm, Mohan Lal and Shanti Kumar

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[1] ***Whether the reporters of the local papers may be allowed to see the Judgment ? Yes***

respondent / defendant No.2 are partners of the respondent / defendant No.1 firm. The allegations are that defendants have paid some amount but still Rs.3 lacs balance amount was payable by the defendants and for this amount the suit was filed by appellant / plaintiff.

3. Defendant No.1 filed application dated 22.12.1995 under Section 34 of the Act for staying the suit till the award is passed by the Arbitrator. In the application, it has been alleged that there is an arbitration agreement dated 12.3.1993 vide which the present dispute between the parties is referable to sole Arbitrator Shanti Swaroop whose decision shall be final and binding on both the parties. The application was contested by appellant / plaintiff. It has been submitted that Shanti Swaroop is the real brother of Mohan Lal, partner in respondent / defendant No.1 firm and he cannot be an independent Arbitrator. The appellant / plaintiff denied agreement dated 12.3.1993.

4. The learned trial Court framed the following issues:-

i) Whether the suit is liable to be stayed under Section 34 of the Arbitration Act, as alleged? OPD-1.

ii) Relief.

The learned Additional District Judge allowed the application under Section 34 of the Act, hence, this appeal.

5. I have heard the learned counsel for the parties and gone through the record. Pt.Om Parkash, learned counsel for the appellant, has submitted that there is no arbitration agreement between the parties. Shanti Swaroop, named Arbitrator in the agreement dated 12.3.1993, is not independent person, he is real brother of Mohan Lal partner of respondent / defendant No.1 firm. Mr.K.D.Sood, learned counsel for the respondents, has submitted that there is an agreement between the parties for referring their dispute to the Arbitrator. The agreement has been proved on record. He has supported the impugned order.

6. PW-1 Mohan Lal has proved execution of agreement between the parties dated 12.3.1993 Ext.AW-1/A. In cross examination, he has admitted that Shanti Swaroop respondent / defendant No.2 is his real brother. AW-2 Suresh Kumar Sood is the attesting witness of agreement Ext.AW-1/A. He has stated that agreement Ext.AW-1/A was executed in his presence between the parties. The second witness of the agreement is Avinash Chander. AW-3 Balraj Kaushal, Advocate, has stated that, on the instructions of the parties, he drafted agreement Ext.AW-1/A. It was read over to them and thereafter they signed it after admitting its correctness. In cross examination, he has stated that he has not written on agreement Ext.AW-1/A that it was drafted by him. AW-4 Avinash Chander has stated that agreement Ext.AW-1/A was written at the instance of Badri Dass and Mohan Lal by AW-3 Balraj Kaushal. The parties signed the

agreement in his presence as well as in presence of other witness. RW-1 Ashwani Kumar has stated that he is Clerk of defendant No.1 firm. He has not brought the summoned record because it was stolen on 7.9.1999 from the train in which he was travelling, a report No.13 dated 7.9.1999 to this effect was lodged at Railway Police Chowki, Hoshiarpur, a copy of such report is Ext.RW-1/A.

7. The execution of agreement Ext.AW-1/A dated 12.3.1993 between appellant / plaintiff and respondent / defendant No.1 has been proved on record. As per this agreement, Rs.60 lacs were given to appellant / plaintiff by respondent / defendant No.1 for *Katha* business on terms and conditions mentioned in the agreement, clause 9 of the agreement provides that in case of any dispute between the parties concerning to and connected with the terms of the agreement, the matter shall be referred to the sole arbitration of Shanti Swaroop whose decision shall be final and binding upon both the parties. Thus, there is an arbitration clause in the agreement for settling the dispute between the parties. It has been submitted on behalf of the appellant / plaintiff that since respondent / defendant No.2 is the brother of Mohan Lal, partner of respondent / defendant No.1, therefore, he cannot be expected to be impartial while deciding the case. The parties executed the agreement voluntarily. It is not the case of the appellant / plaintiff that he was not aware at the time of execution of the agreement that respondent / defendant No.2 is the brother of Mohan Lal partner of respondent / defendant No.1 and in the absence of this

knowledge he executed the agreement. The agreement rather indicates that appellant was aware of relationship of Mohan Lal and Shanti Swaroop. In any case, the scope of present appeal is limited. It has been proved on record that there is an arbitration agreement between the parties. The appellant / plaintiff is at liberty to bring to the notice of the Arbitrator about his apprehension, however, parties and the Arbitrator shall be bound by the law applicable in the matter. The learned Additional District Judge has rightly appreciated the material on record. No case for interference has been made out. Hence, the appeal is dismissed. Interim order dated 7.11.2000 stands vacated.

(Kuldip Singh), J.

December 11, 2007
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